

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

No. 77-6118

United States Court of Appeals for the Second Circuit.

LOUIS C. OSTRER, RITA OSTRER, JACK OSTRER
AND DINA GELMAN,
PLAINTIFFS, APPELLANTS,

v.

WILLIAM H. ARONWALD, ROBERT B. FISKE, JR.,
ALAN NAFTALIS, MARVIN SONTAG, JAMES KILLEEN,
EDWARD H. LEVI, AND UNITED STATES
OF AMERICA,
DEFENDANTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

Brief of the Plaintiffs-Appellants.

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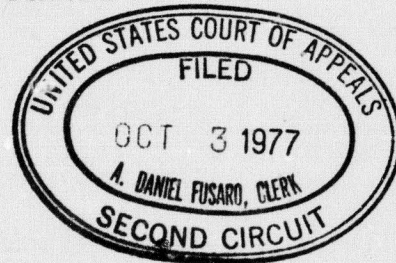


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v.

WILLIAM I. ARONWALD, ROBERT B. FISKE, JR.,
ALAN NAFTALIS, MARVIN SONTAG, JAMES KILLEEN,
EDWARD H. LEVI, and THE UNITED STATES OF AMERICA.
Defendants-Appellees.

Civil Appeal

No. 77-6118

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Brief for the Plaintiffs-Appellants.

Issues Presented for Review

I. Whether a deliberate campaign of harrassment which includes leaks by prosecutorial team members to news media about plaintiffs' purported associations with organized crime, ominous warnings to persons who do business with plaintiff that they would be wise not to associate with him, repetitive subpoenaing of plaintiff and his business records to various forums, and other oppressive actions, all undertaken in the absence of any good faith belief that the target citizen is guilty of wrongdoing, and with the aim of coercing the citizen into waiving

his constitutional rights and becoming a pliable, suggestible informant/witness for the Government, is a wrong for which a federal court may grant a remedy; and whether a threat by prosecutors to indict not only a target defendant but also that target defendant's son, wife, father and sister, all without a good faith belief that the family members are guilty of wrongdoing, in order to "convince" the target defendant to become a pliable, suggestible government witness who could prevent his loved one's indictment by accepting that proposed role, is an actionable wrong for which a District Court may grant a remedy.

II. Whether Internal Revenue Service agents, assigned to a prosecutorial team, may lay claim to the same immunity accorded a prosecutor under the rule of Imbler v. Pachtman.

III. Whether Imbler precludes an action against a prosecutor for wrongs he has committed in the course of acting as an investigator and/or administrator; whether Imbler grants a prosecutor full immunity as against an action charging him with misconduct beyond the proper exercise of his authority; and whether Imbler grants a prosecutor immunity from suit in an action which seeks injunctive and declaratory relief as well as one seeking money damages.

IV. Whether the District Court was in error in dismissing the complaint as "premature" and as one which improperly impinges upon a grand jury proceeding.

Statement of the Case

Introductory Statement

This appeal raises a series of important issues concerning the legitimacy of several extraordinary prosecutorial tactics being used to coerce a citizen's "cooperation" as part of an investigation into suspected criminal activities. In essence, the appellants ask if there is any limit at all to the pressure the Government may bring to bear upon a citizen in order to obtain his "cooperation." Relatedly, this appeal poses serious issues concerning the scope of a federal court's adjudicative and remedial powers in the context of a citizen's complaint that the government is engaged in a pattern of activities which violate his constitutional rights and the rights of others in his immediate family. It raises issues concerning the scope of the United States Supreme Court's ruling in Imbler v. Pachtman. And it questions the propriety of short-circuiting or deferring adjudication of serious claims of civil rights violations by allowing a motion to dismiss in a case in which the Government has not even denied the plaintiff's allegations of wrongdoing.

Proceedings Below

On August 19, 1976, the Plaintiffs Louis C. Ostrer, Rita Ostrer, Jack Ostrer and Dina Gelman commenced an action in the United States District Court for the Southern District of New York. Louis Ostrer, for years, has been a subject of prosecu-

torial interest by both state and federal authorities. Rita Ostrer is his wife. Jack Ostrer is his father. Benjamin Ostrer is one of his three sons.^{1/} Dina Gelman is his sister.

The plaintiffs alleged that members of the then Joint Strike Force against Organized Crime and Racketeering for the Southern District of New York were (and are) engaged in a deliberate, wrongful, illegal, unethical, and, indeed, criminal course of conduct in orchestrating a grand jury proceeding, in directing an unwarranted campaign of harrassment against the plaintiffs, and in pressing a coercive proposal upon the plaintiff Louis C. Ostrer in order to obtain his "cooperation" as a Government witness. Louis C. Ostrer was (and, to the best of plaintiffs' knowledge, remains) a target of the grand jury investigation. The defendant immediately in charge of the ongoing investigation and grand jury proceeding involving the plaintiffs was (and is) Alan Naftalis. William A. Aronwald, at the time of the bringing of the action, was the Chief of the

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On the same date that the plaintiffs in this action filed their complaint, Benjamin Ostrer brought a related action alleging that the same defendants were improperly manipulating grand jury proceedings in order to obtain an indictment against him for the improper purpose of pressuring and coercing his father Louis Ostrer into relinquishing his Fifth Amendment privilege against self-incrimination and into providing the Government with testimony which, regardless of its truth or falsity, would incriminate various labor officials. The wrong of which Benjamin complained is, of course, one which also affected the plaintiffs herein. The Government's attempts to hold Benjamin (and other family members) hostage for the ransom of Louis Ostrer's agreement to become a "cooperating individual" are discussed infra at 17-18.

Organized Crime Strike Force in the Southern District. Defendants James Killeen and Marvin Sontag were Internal Revenue Service investigators, assigned to the Strike Force team concerned with the investigation of the plaintiffs.^{2/}

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The Strike Force in the Southern District was disbanded and its functions absorbed into the structure of the Office of the United States Attorney in late 1976. Some of the same defendants, however, continued to engage in the wrongs complained of at time of the filing of this action.

The complaint named Robert B. Fiske, Jr., and Edward H. Levi as additional defendants on the theory that their inadequate supervision of the activities of the other defendants was a neglect for which they were liable to wronged parties such as the plaintiffs. The District Court ruled that the plaintiffs' "allegations regarding Levi and Fiske [did] not suffice to state direct and personal responsibility for the purported misconduct of their subordinates." (App. 24) That ruling is not at issue in this appeal, particularly given the structural change in the Strike Force's being absorbed into the United States Attorney's Office. Plaintiffs expect that, at this time, the actions of the former Strike Force members , are subject to closer scrutiny by the United States Attorney than was true when the Strike Force operated as a quasi-independent investigatory and prosecutorial office.

Mindful of our responsibility to inform the Court of developments since the time of the entry of the District Court decision which might affect this Court's view of the issues in this case, Fusari v. Steinberg, 419 U.S. 385, 300-91 (1975) (Burger, C.J., concurring), plaintiffs counsel believe that this Court should also know the following. On information and belief, Marvin Sontag has retired and is no longer with any federal prosecutorial office. Upon the merger of the Strike Force with the Office of the United States Attorney for the Southern District, William Aronwald became Chief of the Strike Force in the Eastern District; he is now engaged in the private practice of law.

The pattern of harrassment alleged by the plaintiffs in Counts 3 and 4 of their complaint continues unabated under the direction of Defendant Naftalis. Louis Ostrer's son Benjamin Ostrer has been admitted to the Bar of the State of New York, and was sworn in as a member of that Bar in September of 1977. No indictments have been returned against any of the plaintiffs herein, although, on information and belief, Defendant Naftalis continues to present "evidence" concerning plaintiffs to that grand jury.

The plaintiffs complained that 1) evidence derived from illegal electronic surveillance was being presented to the grand jury by the defendants and that, additionally, 2) evidence derived from Louis C. Ostrer's testimony, under a grant of immunity before a state grand jury concerning matters related to the projected federal prosecution, was being presented by the defendants to the grand jury sitting in the Southern District.^{3/} Louis C. Ostrer individually complained that the defendants were engaged in a campaign of harrassment against him in order to convince him that he should become a Government witness and give testimony pleasing to the defendants against "organized crime figures" and "labor racketeers" whom the defendants are desirous of prosecuting. Ostrer has further alleged that the defendants' continuing efforts to demonstrate how difficult one's personal and business life can be when one refuses to "come over" to the Government's side have included repeated subpoenaing of Ostrer's business records before different bodies in different locations, repeated summonsing of Ostrer himself before bodies to give testimony, deliberate leaking of defamatory allegations to the news media, making public statements maligning Ostrer, attempting to dissuade Ostrer's business associates from

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The District Court's disposition of these first two counts of the complaint is not at issue in this appeal. Nor is the lower Court's ruling as to Count 5 -- a charge that the defendants purloined a privileged attorney-client document -- challenged in this appeal.

continuing to deal with him by claiming that Ostrer is dishonest and/or that it is dangerous to be in his company, and, finally, investigating and reinvestigating Ostrer's affairs, year after year, in an effort to cause him expense and to distract him from his legitimate business concerns.

In the denouement to this oppressive, vexatious pattern of government conduct, the plaintiffs allege that the defendants have concocted and presented to plaintiffs' counsel a brazenly improper threat -- unless Louis Ostrer decides to "cooperate" with the defendants and agrees to given information and testimony, in the form desired by the defendants, against targets of the defendants prosecutorial interests, then the defendants will proceed to indict not only Louis C. Ostrer, but also his father, wife, sister, and oldest son. Thus, unless Louis Ostrer tells the defendants what they want to hear -- regardless of the truth or falsity of such statements -- three generations of the Ostrer family will be indicted. These averments of the complaint were supported by affidavits by the plaintiff Louis C. Ostrer and from the plaintiffs' attorneys.

On August 19, 1976, the Hon. Henry F. Werker entered a temporary restraining order and an order to show cause. The defendants were temporarily restrained from presenting to the grand jury any evidence obtained directly or derivatively from unlawful wiretaps and electronic eavesdropping devices on any of the plaintiffs and were further enjoined from presenting to

the grand jury "any evidence obtained directly or derivatively from testimony given by any of the [plaintiffs]...under a grant of immunity, conferred by the Courts of the State of New York..." (App.25) Judge Werker ordered the defendants to file answering papers within five days and to appear at a Part I session nine days later to show cause why the Court should not grant a preliminary injunction.

The Defendants thereupon responded with a memorandum of law and affidavits from the defendants Aronwald, Naftalis, Killeen, and Sontag. The memorandum set forth an unsworn alternative version of the facts surrounding the investigation and grand jury proceeding involving the Ostrers, particularly Louis C. Ostrer; it then argued that the plaintiffs were seeking an order restraining the grand jury and that the District Court lacked jurisdiction to enjoin that body; the memorandum then went on to claim that the Government was "not employing the tainted fruits of illegal wiretaps and searches" during the course of the grand jury presentment, having constructed a "Chinese wall" around their investigation, see United States v. Sapere, 531 F.2d 63 (2d Cir. 1976). None of the documents submitted by the defendants countered the plaintiffs' averments in Counts 3 and 4 of the complaint.

On August 31, 1976, Judge Werker vacated the temporary restraining order and declined to grant a preliminary injunction. The Court's ruling was concerned solely with the issues of the

defendants' alleged use of evidence derived from illegal wire-taps and immunized testimony in presenting evidence to the grand jury. The Court ruled that, in view of the "substantial and credible" evidence provided by the defendants to the effect that evidence then being presented to the grand jury had not been obtained, directly or indirectly, from illegally obtained evidence or from immunized testimony, a suppression hearing at that time concerning the plaintiffs' allegations was not warranted. Such a hearing would, in the Court's opinion, be contrary to the principles of United States v. Calandra, 414 U.S. 338, 349 (1974) and United States v. Dionisio, 410 U.S. 1 (1973) to the effect that a grand jury proceeding should not be interrupted with "minitrials and preliminary showings," especially when the persons claiming to be aggrieved have an adequate remedy at law which can be claimed to defend against any wrongfully obtained indictment. In this case, the Court noted, "[if]...an indictment is returned, the plaintiffs may move to dismiss the indictment and to suppress excludable evidence..."^{4/} (App. 229-34)

Preliminary relief having been denied, the case was assigned to the Hon. Robert J. Ward.

^{4/}

Plaintiffs have not pursued in this appeal the issue of whether pre-indictment relief from the Government's use of certain evidence during the course of the grand jury proceeding should have been granted. If any indictment should be returned, plaintiffs would certainly assert the right which Judge Werker's ruling recognizes -- that is, they would seek a full evidentiary hearing in order to demonstrate how the evidence before the grand jury was tainted so that the indictment should be dismissed.

The Defendants filed no answers to the complaint. Instead, by a notice of motion dated December 20, 1976, the Assistant United States Attorney, under the name of the Defendant Robert B. Fiske, Jr.,^{5/} apparently representing all of the defendants, sought an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The accompanying memorandum raised a variety of issues concerning both the merits of the plaintiffs' claims and alleged procedural barriers (including the complaint's "prematurity") all of which, the defendants argued, should result in the dismissal of the action.^{6/}

The defendants' motion to dismiss was granted by the District Court in an order and opinion dated June 21, 1977.

Opinion Below

The opinion by the Hon. Robert J. Ward of the United States District Court for the Southern District of New York is not yet reported and is reproduced in the Appendix at pages 270-310.

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Earlier, another Assistant United States Attorney had filed a "Memorandum of Law Submitted on Behalf of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, In Opposition to the Issuance of a Temporary Restraining Order and Preliminary Injunction," in which it was stated that "it is clear that Mr. Fiske is named purely as a nominal defendant. The investigation in question and the presentation of evidence to a grand jury is wholly in the hands of Strike Force Attorneys."

6/

The Defendants did not move for summary judgment pursuant to Rule 56, nor did the District Court treat their Motion to Dismiss as one for summary judgment.

FACTS*

The defendant members of the prosecutorial team investigating the plaintiff Louis C. Ostrer and other members of the Ostrer family purport to believe that the Ostrers -- and Louis C. Ostrer in particular -- have "connections with organized crime" and with "labor racketeers." These utterly vague terms have no clearer definition in the usage of the prosecutors, who have followed a policy of labelling anyone who has any acquaintance or does any business -- including wholly legitimate business -- with a person suspected by the prosecutors as being involved with "organized crime" or "labor racketeering" as one thus "associated". They themselves then become targets for the prosecutors because of their suspected knowledge of illegal activities by others.

The Defendants in this action have labelled the plaintiffs -- particularly Louis C. Ostrer -- as persons "connected with organized crime and labor racketeering." The government, however, through the efforts of the defendants in this action and through the efforts of other investigators, has been quite unable and continues to be unable to prove that the Plaintiff's own activi-

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The facts set out herein are as they are in the plaintiffs' complaint, as supplemented by the affidavits of Louis C. Ostrer and of counsel. This appeal concerns the propriety of the District Court's granting of a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. In ruling upon a motion to dismiss, the District Court and, now, this Court, are to assume the allegations of the complaint to be true and to treat the averments in the light most favorable to the plaintiffs.

ties are unlawful in any respect.^{8/} Despite this lack of evidence of wrongdoing by plaintiffs, the defendants have embarked upon an oppressive course of conduct designed with the specific aim of discrediting the plaintiffs in order to deprive them of their means of earning a livelihood.

This campaign of harrassment has included, from time to time, an alliance by the defendants with state and other federal law enforcement agencies. The Defendants have summonsed or attempted to summons the plaintiffs before multiple grand juries, located in different jurisdictions, at approximately the same time, to give evidence on essentially the same subjects and events. In addition, they have seized, subpoenaed and otherwise appropriated the plaintiffs' business records time and time again. These papers, like the plaintiff Louis C. Ostrer himself, have been subpoenaed before different grand juries in different locations. The defendants have effected this plan with the specific aim of making it impossible for the plaintiffs to conduct their business affairs in an orderly fashion. As a result of the defendants harrassment, the plaintiffs have been put to severe inconveniences, some of their business enterprises have failed, and they have suffered losses in the millions of dollars.

8/

This statement refers to any alleged crimes committed by plaintiffs for which they could be charged and tried at this time. It does not refer to Louis Ostrer's conviction, upon his plea of guilty, in the New York Supreme Court in 1969 for the crime of larceny, nor to his federal conviction in the "Belmont stock fraud case", a conviction which is still under vigorous attack. See Ostrer v. United States, 77 Civ. 1805-CLB (S.D.N.Y., August 12, 1977); appeal docketed, C.C.A. No. 77-2103.

Additionally, the defendants have embarked on a "media campaign" against the Ostrer family: they have leaked to the news media, to the business world and to the public in general, a series of defamatory stories about the plaintiffs. The defendants have undertaken this effort with the specific purpose of destroying others' confidence in the Ostrers' integrity and talents so that the Ostrers' businesses will be seriously damaged. The defendants have also made public statements in open court and before Congressional committee proceedings maligning the plaintiffs, despite the fact that their "proof" to support these charges is wholly insufficient to support any formal charge or conviction for the serious wrongs the plaintiffs are continually charged with having committed.

As if these were not sufficient to wreak havoc with plaintiffs' business ventures, the defendants have enlisted the cooperation of other state and federal law enforcement authorities and have gone directly to plaintiffs' business associates and have attempted to persuade those persons that they should halt all dealings with the Ostrers for any of several reasons. The defendants have claimed variously that the Ostrers are dishonest and that it is dangerous (in several senses!) to associate with the Ostrers.

Finally, and most oppressively, the defendants continue to engage in repetitious and overlapping investigations of the plaintiffs' affairs year after year. This continual investigating has been undertaken with the specific goal of wearing the

plaintiffs down, and causing them to incur large expenses for legal and other professional representation.

The defendants know full well that the Ostrers have done nothing wrong or illegal. The only sin that the Ostrers have committed in the defendants' eyes is their association with and conducting of legitimate business with persons whom the defendants suspect of being "organized crime figures" and/or "labor racketeers." Despite the fact that they know the Ostrers are guilty of no wrongdoing, the defendants have instigated this campaign of harrassment as a substitute for the orderly and lawful investigation and prosecution which they know they could not sustain because no court would tolerate its process being so abused once it became clear that the defendants had no case against the Ostrers. This campaign, then, is being used as a device for punishing the plaintiffs for their associations. This type of punishment serves the defendants' illegitimate ends by appearing as a warning to others that association with persons whom the government suspects of wrongdoing will lead to being treated like a wrongdoer.

In early 1976, the Ostrer "investigation" reached the grand jury stage. The purpose of the grand jury proceedings, as orchestrated by the defendants, has been to put maximum pressure upon Louis C. Ostrer to live up to the Govenrment's fondest hopes that he will give in to the defendants' blandishments and decide to become a "cooperating individual" and give the defendants the

information and testimony they so desire against certain "organized crime figures" and "labor racketeers".

The Government, and the defendants in particular, purport to believe that Louis C. Ostrer, because of his association with labor unions and labor union officials, has potentially incriminatory information about those persons, who are designated "organized crime figures" and "labor racketeers" by the defendants. The defendants are most eager to have any such information from Louis C. Ostrer; in fact, they want to know everything Louis C. Ostrer knows about these persons and their actions; in fact, the defendants have a very definite idea of just what they want to hear from Louis C. Ostrer's lips about these targets for possible prosecution -- they want information and testimony from Ostrer, whether it be true or false, which is of a sort that will put the targets behind bars.

Although the Defendants have no credible or usable evidence that Louis Ostrer has ever committed a crime in any of his dealings with any labor union or labor union official, the defendants have persisted in their threats to prosecute Ostrer and others with the aim of forcing Ostrer to give information and testify against business and personal associates. The defendants are not fussy about whether the information and testimony is true or false; as long as it will serve to convince a grand and petit juror of the guilt of target defendants, the Government wants Louis Ostrer to deliver the testimony so that the "organized

crime figures" and "labor racketeers" whom the Government yearns to convict will be convicted. Thus, the Government's fondest hope is that Louis C. Ostrer will permit it to write a script which Ostrer will then deliver in a credible manner before the appropriate judicial bodies.

Ostrer has repeatedly stated that he simply does not have the "information" which the defendants so fervently seek. He has so stated on numerous occasions, several times under oath (he has never been indicted for perjury or lying as to the result of such statements). Yet the defendants have persisted in their efforts to get Ostrer to "come over." They have no knowledge that Ostrer has committed a crime, nor that others in his family have committed any crimes. Nor do their suspicions meet any standard of probable cause or even any lesser legal standard which might justify the launching of a sustained, full-scale, intensive investigation of the plaintiffs in this action. Instead, the defendants' pursuit of the plaintiffs has been based solely upon a desire to make their lives sufficiently miserable so that the life of a "cooperating individual" seems placid and appealing.

A dramatic escalation of the defendants' general harrassment of the plaintiff Louis C. Ostrer for the reasons set out above led to the filing of this action. The defendants (perhaps despairing of ever being able to ensnare Louis Ostrer in their plans for his role as a Government informant and witness) decided

to focus their attack on Louis Ostrer on an area of his life in which he is most vulnerable -- his love for his family. The defendants have threatened to indict Louis Ostrer's wife, his father, his sister, and his son.^{9/} The defendants have put the matter quite starkly: either Louis Ostrer is forthcoming in the manner the Government desires -- that is, he sings the song they want to hear -- or else Ostrer himself and those closest to him will be indicted. The Government's projected indictment of Ostrer's family members is not motivated by any belief or evidence that those family members have committed indictable offenses, but instead is part of a plan to put maximum pressure on Louis Ostrer to give the defendants the testimony they are so desirous of hearing. Thus, the defendants are in effect holding Louis Ostrer's relatives hostage unless and until he frees them with the ransom of his testimony, whether that testimony be true or false so long as it is pleasing to the defendants in that it serves to charge and convict suspected "organized crime figures" and "labor racketeers."

At the time of the filing of the complaint in this case, Louis Ostrer was under particularly acute pressure to act in a way that would spare his son Benjamin, a 1976 law school graduate

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All these persons, with the exception of Benjamin Ostrer, Louis Ostrer's oldest son, are plaintiffs in this action. Benjamin Ostrer brought a separate action on his own behalf, and was denied relief in an opinion issued on the same date as the District Court's decision in this case (No. 76 Civ. 3702-RJW). Benjamin Ostrer has not sought review of that ruling in this Court.

and then an applicant for admission to the New York Bar, the blot of indictment with the dire consequences that such a formal charge might have on his efforts to be admitted to practice.^{10/} The defendants have made it clear to Louis Ostrer that he can spare his son, as well as his wife, father, and sister, the public obloquy of an indictment if he will just do as the defendants say. The defendants have made it clear that the other Ostrer family members cannot save themselves by "cooperating"; only Louis Ostrer, by profering the testimony the government wants, can rescue them.

The defendants' technique is criminal under New York State law in that it constitutes coercion in the second degree. Furthermore, the "hostage" technique is clearly unethical and serves to violate the plaintiffs rights under the First and Fifth Amendments.

The defendants have not denied the plaintiffs' claims.^{11/}

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Despite the fact that Benjamin Ostrer has now been sworn in as a member of the Bar, see n.2, supra, the issue of the propriety of the defendants' conduct is by no means moot. The defendants indictment of Benjamin would pain his father now just as it would have earlier.

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As noted, the defendants filed no answer, merely a motion to dismiss the complaint for failure to state a claim. Earlier, however, as part of its submission in opposition to the plaintiffs' request for a preliminary injunction, the defendant Aronwald filed an affidavit in which he stated, inter alia, that "During the course of [a meeting among counsel for the plaintiffs and the defendants] the subject of cooperation by Louis C. Ostrer was raised and I indicated that the Government was especially interested in obtaining such cooperation and further, that if Mr. Ostrer did cooperate it was possible that his relatives would not be indicted as was the case in the investigation of one Moe

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Indeed, the defendants have expressly stated to counsel for the Ostrer family that the family members would be dealt with precisely as those family members have alleged in their complaint! The thrust and the particulars of these illicit proposals by the defendants are set forth in the Affidavits of Harvey A. Silverglate and Alan Dershowitz, filed with the Complaint. Mr. Silverglate states that during a meeting among Strike Force members and the Ostrer attorneys on June 11, 1976,

"I asked what it was that the Strike Force wanted from Louis Ostrer and from his family members. Mr. Aronwald said that they wanted evidence and then testimony against 'certain persons'. Mr. Aronwald said that Louis Ostrer has for years dealt with 'labor racketeers' and 'organized crime figures', and the Strike Force wanted to know all that Louis Ostrer knows about the illegal activities of such persons. Mr. Sontag indicated that they know that Louis Ostrer must have paid bribes and kickbacks to labor officials in return for getting labor union business, and the Strike Force wanted information and cooperation along these lines....

* * *

"Mr. Dershowitz then asked the following question: What if, instead of Louis Ostrer's testifying as to what he knows, other family members instead would testify as to what they know. Since Louis Ostrer would not testify, however, and since it was unlikely that the other family members (even if they testified) would be targets of retribution from those against whom they would testify, then all of the family members would be safe from retribution. Would this be sufficient, asked Mr. Dershowitz, in order to enable the other family members (other than Louis Ostrer) from being indicted? Mr. Aronwald said absolutely not. He said that Louis Ostrer's testimony was an absolute

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Steinman which had previously been conducted by my office..." (App. at 225) Although Mr. Sontag has claimed in his affidavit that he "stated that [at the May 18, 1976 meeting] the investigation with respect to Mr. Ostrer's family was not actuated by a desire to punish Mr. Ostrer," (App. at 316) no other defendant has claimed he made such a statement nor denied the truth of plaintiffs' claims.

essential part of any 'deal'. Louis Ostrer's testimony could get the whole family out of the case, he said, while the testimony of everyone except Louis Ostrer could get none of them out."

(App. at 166, 170) And Mr. Dershowitz states that, in a July 1, 1976, telephone conversation with Mr. Naftalis

"Mr. Naftalis stated clearly and unequivocally... that if Louis Ostrer was willing to come forward and cooperate, Naftalis would communicate this to his boss, William I. Aronwald, and would recommend that Benjamin not be indicted. He said that he was confident that in such circumstances, Mr. Aronwald would agree and would 'not go forward' and indict Benjamin. He reiterated that it was Louis Ostrer in which the Strike Force was interested, because Louis Ostrer was involved with a lot of Teamsters Union people and was connected with the funds that have been the subject of pressure by the press. He said that if Louis Ostrer were to do the sensible thing, he (Louis Ostrer) could thereby prevent the indictment of his son Benjamin. He said that in practical terms, Benjamin would be cut loose if Louis cooperated and that the Government does that all the time, such as cutting a wife loose when a husband cooperates."

(App. at 174-75).

To these allegations, the defendants respond only that the plaintiffs have failed to state a claim upon which the Court may grant relief. The defendants' claims are two-fold; first, that the complaint is inadequate and second, that they are, in any event, immune.

ARGUMENT

I. THE PLAINTIFFS HAVE ADEQUATELY PLED FACTS WHICH STATE A CAUSE OF ACTION AGAINST THE DEFENDANTS.

The plaintifffs charge that the defendants have embarked upon, and continue to engage in, a course of harrassment and coercion which violates their Due Process rights to be free of the use of prosecutorial power for vindictive and improper purposes.^{12/} See Blackledge v. Perry, 417 U.S. 21 (1974). The conduct of which the plaintiffs complain -- and which the defendants assert does not even constitute a claim upon which relief can be granted -- is a deliberate, sustained, illegal attempt to destroy the plaintiffs' legitimate business interests and to apply other wholly improper pressures to the plaintiffs -- particularly Louis C. Ostrer -- with the aim of coercing them into abandonning their rights under the Constitution and agreeing to become apparatchiks in the Government's efforts to prosecute, convict and imprison certain "organized crime figures" and "labor racketeers". The plaintiffs' claim that this course of conduct is not only unbecoming to the United States and violative of the rights of her citizens, but is also violative of the

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The plaintiffs further claim that the defendants conduct violates their rights under the First, Fourth, and Fifth Amendments guaranteeing citizens' rights to freedom of association, to familial privacy, to freedom from unreasonable searches and seizures, to freedom to engage in legitimate business, and to the right against self-incrimination. The Constitutional grounds for the complaint may be parsed out in various ways; it would seem that the Fifth Amendment's guarantee of Due Process is the jurisdictional aegis under which all of the various claims fall.

criminal laws of the State of New York.^{13/}

None of the cases in which the Courts have felt compelled to grant relief to persons victimized by the type of oppressive prosecutorial conduct at issue in this case even approach the level of egregiously improper actions and threats that the defendants in this case have directed at the plaintiffs.

If the Government acts improperly in bringing an "extra" charge of false statements against a defendant, already indicted for related offenses, because the defendant stands on his right to move for a change of venue under 18 U.S.C. § 3237(b), do not the defendants in this case act improperly when they threaten to indict a man's wife, sister, father and son if he stands on his right not to join leagues with the defendants as a "co-operating individual"? See United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977). If the Government acts improperly in

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In People v. Logan, 241 N.Y.S.2d 344 (Sup.Ct., Queens Cty 1963), the Court observed that policeman's threat to arrest a defendant's mother, brother, and others residing in the apartment unless the defendant led the police to a gun "brought them to, if not over the brink of criminal coercion." Id. at 350. The Logan Court referred to the predecessor to the current coercion statute, New York Penal Law § 135.60, which now provides, inter alia, that

A person is guilty of coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a legal right to refrain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in the victim a fear that, if the demand is not complied with, the actor or another will:

...

(4) Accuse some person of a crime or cause criminal charges to be instituted against him.

threatening to bring an habitual offender indictment against a defendant if he refuses to plead guilty and insists on his right to a trial on the underlying, unenhanced charge, do not the defendants in this case act improperly when they announce their intentions to proceed with a sustained, unwarranted "investigation" of an entire family unless one member of that family relinquishes his right to remain silent and not make possibly self-incriminatory statements? See Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976), cert. granted sub nom. Bordenkircher v. Hayes, 97 S.Ct. 2672 (1977) (No. 76-1334). If the Government acts improperly in filing additional charges against a defendant charged with a misdemeanor who refuses to waive his right to trial before a District Court judge, do not the defendants in this case act improperly when they threaten to bring charges against members of a man's immediate family with the avowed goal of exerting pressure on that man to tell the prosecution the words and stories they want to hear about various target defendants? See United States v. Lippi, Cr. No. 77-134 (D.N.J. July 28, 1977). 21 Cr.L.Rptr. 2459. If the Government acts improperly in using the threat of a criminal investigation in order to force a contractor into "agreeing" to a reopening of the administrative proceedings concerning the award of cost overruns on a government contract, do not the defendants in this case act improperly in using a plethora of threats concerning a protracted grand jury inquiry of an entire family in order to force a citizen to ransom his loved ones with testi-

mony, tailored by the government, against suspected "organized crime figures" and "labor racketeers"? See United States v. Litton Systems, Inc., Cr. No. 77-70 (E.D. Va., May 25, 1977). 21 Cr.L.Rptr. 2258.

The District Court's characterization of the plaintiff's factual allegations in the third cause of action as a mere "broad brush portrayal of the defendants as vengeful conspirators" which "lacks sufficient substance to state a claim" is easily belied by the text of the complaint itself. The plaintiffs have set out, in considerable detail, the form of the defendants illicit campaign to violate directly and to coerce the plaintiffs, especially Louis Ostrer, into waiving their constitutional rights.

The District Court's erroneous ruling that the facts alleged fail to state a claim flies in the face of the requirement that a defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules, should be granted only if the defendant succeeds in demonstrating "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1975). To survive the defendants' motion to dismiss, the plaintiffs need not prove that they are likely to succeed on the merits; instead the defendants must show that the plaintiffs can prove no set of facts which would enable them to prevail. The District Court's ruling violates the Supreme Court's teaching that

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief' *Conley v. Gibson*, 355 U.S. 41, 45-46 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (footnote omitted).

See also *Gardner v. Toilet Goods Assn.*, 387 U.S. 167, 172, 87 S.Ct. 1526, 1529, 18 L.Ed2d 704 (1967).

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

The caselaw which reiterates these basic principles is legion and reflects the basic hostility of the federal courts toward disposing of cases upon the pleadings alone: "[T]he primary objective of the law is to obtain a determination of the merits of any claim; and...a case should be tried on the proofs rather than the pleadings." Rennie & Loughlin, Inc. v. Chrysler Corp., 242 F.2d 208, 213 (9th Cir. 1957).

This prohibition against dismissal of cases which meet the basic notice pleading requirements of the Federal Rules^{14/} is

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Rule 8(a) requires only that the complaint include a short and plain statement of the claim. The cases are clear that no distinction is to be drawn among "evidence", "ultimate facts", and "conclusions" in the context of determining just what

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even more pronounced -- appropriately so -- in cases in which citizens allege that their constitutional rights have been or are being violated by governmental actions. Courts in this circuit have consistently read complaints charging civil rights violations in a liberal, generous manner in order to avoid summary dismissal of important claims with less than a full opportunity for plaintiffs to demonstrate the merits of their claims. Weisman v. LeLandais, 532 F.2d 308, 311 (2d Cir. 1976); Build of Buffalo v. Sedita, 441 F.2d 284, 287 (2d Cir. 1971); Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2d Cir. 1970); Holmes v. New York Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); Lucido v. Cravath, Swaine & Moore, 425 F.Supp. 123 (S.D.N.Y. 1977); Heese v. DeMatteis Development Corp., 417 F.Supp. 864, 870 (S.D.N.Y. 1976); Dunleavy v. Termullo, 410 F.Supp. 1166, 1169 (S.D.N.Y. 1976).^{15/}

¹⁴ [continued from page -25-/
constitutes an adequate statement under Rule 8(a). See U.S. v. Employing Plasterers' Intern. Union, AFL-CIO v. Delta Refining Co., 227 F.2d 694, 697 (1960); Garcia c. Bernable, 289 F.2d 690 (1961); Wright, Law of Federal Courts, §68 (2d ed. 1970).

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To be sure, a smattering of cases in this Circuit state that a civil rights complaint may properly be dismissed if it contains only "conclusory" "vague" or "general" allegations and, thus, fails to set forth sufficient facts to show the existence of a cause of action. Fine v. City of New York, 529 F.2d 70, 73 (2d Cir. 1975); Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2d Cir. 1964); Powell v. Jarvis, 460 F.2d 551, 553 (2d Cir. 1972); Harris v. Ward, 418 F.Supp. 660, 661-2 (S.D.N.Y. 1976); Stenson v. State of New York, 422 F.Supp. 38 (S.D.N.Y. 1976). Cf. Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944). Each of these cases allowing the defendants' motion to dismiss involved claims considerably more "conclusory", "vague" and "general" than the

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The District Court's citation of Jacobson v. Organized Crime and Racketeering Section, 544 F.2d 637 (2d Cir. 1976)

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complaint in the case at bar. In Fine, the Court remarked that complaints in civil rights actions "are plainly insufficient unless they contain at least some allegations of facts indicating a deprivation of civil rights." Fine claimed, first, that state prosecutors had acted improperly in the course of their presentation of evidence to a grand jury; the Court properly ruled that the defendants were immune from such a suit. Second, Fine claimed -- apparently with no factual pinning-down at all and, thus, "in the most conclusory terms" -- that the defendants had "wrongfully withheld his property, suborned perjury, tampered with and coerced witnesses, hindered criminal prosecution, and committed other wrongful acts." Id. at 73. Although the Court's decision does not quote directly from the wording of the complaint, it seems clear that the text of Fine's complaint was as "conclusory" as the Court's description of it. Similarly, in Powell v. Workman's Compensation Board, the plaintiff's complaint contained only "general allegations, framed in broad language closely paralleling that used in Sections 1983 and 1985(3), that the plaintiffs successfully conspired to deprive plaintiffs of their rights." The Court noted that "at least some degree of particularity" was required in alleging the "overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." That "bill of particulars" has been adequately set out in the Ostrer's complaint which clearly includes more than a tracking of the text of the various constitutional amendments which guarantee plaintiffs rights which are being violated by the defendants. In Powell v. Jarvis, the complaint was deemed to be a "hodgepodge" of vague and conclusory allegations" which presented "no facts which would be sufficient to support his claims." (emphasis added). In Stenson, the Court read the complaint as setting "forth no more than an allegedly erroneous determination of a factual question controlled entirely by state law"; thus, no matter how specific the plaintiffs had been in pleading the facts surrounding this determination, their complaint was properly subject to a motion to dismiss. In Harris, also, the plaintiff, in attempting to sue his former court-appointed counsel, under §1983, failed to set out any theory by which they could be deemed to have acted under color of state law.

None of these rulings, then, preclude the plaintiffs in this action from going forward and attempting to demonstrate the truth of their claims. Mr. Justice Clark's observations in the Dioguardi case, at 775, are particularly apt:

"Under the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be

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cert. denied, 45 U.S.L.W. 3666 (April 5, 1977) cannot support the Court's dismissal of the Ostrer complaint. Jacobson brought an action against the Internal Revenue Service and several individual IRS agents, claiming that they had formed a conspiracy to drive him out of business by spreading rumors about him among his customers and had "leaked" a story to a New York newspaper stating that Jacobson was a front for his "under-world figure" father. In dismissing the Ostrers' complaint, Judge Ward remarked that their claims are "reminiscent" of those in Jacobson. Factually, this obviously is correct. But the Jacobson complaint failed, not because its "vague and conclusory claims clearly state[d] no claim for relief," but rather because those claims -- even if they had been detailed and pointed -- failed to allege facts which would support a claim under §1985 -- the claimed jurisdictional basis for the case. Thus, the District Court, at 639, after observing that that plaintiffs allegations were insufficient, stated:

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'a short and plain statement of the claim showing that the pleader is entitled to relief,' Federal Rules of Civil Procedure, rule 8(a), 28 U.S.C.A. following section 723c; and the motion for dismissal under Rule 12(b) is for failure to state 'a claim upon which relief can be granted.'

"Of course, defendant did not need to move on the complaint alone; he could have disclosed the facts from his point of view, in advance of a trial if he chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting."

"Appellants' conspiracy point is founded on 42 U.S.C. Section 1985, which applies only to 'racial, or perhaps otherwise class-based, invidiously discriminatory' action. *Griffin v. Breckenridge*, 403 U.S. 88, 102... (1971). There is no trace of any such allegation in this complaint."

In contrast, the Ostrers have not claimed that their action is brought pursuant to 1985. Rather, they have brought the action as one arising under the First, Fourth, Fifth and Sixth Amendments such that the Court has jurisdiction under 28 U.S.C. §1331. The District Court has found that it properly has jurisdiction of the action under that section. (App. at 282).

The stringent standards which a defendant must meet in order to prevail on a motion to dismiss express a basic hostility in the federal courts toward disposing of a case on the pleadings alone. "[T]he primary objective of the law is to obtain a determination of the merits of any claim, and...a case should be tried on the proofs rather than the pleadings." *Rennie & Loughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 213 (9th Cir. 1957). To secure these proofs, federal courts have at their disposal tools more discriminating than motions to dismiss -- pretrial conferences and discovery procedures, to instance just two -- for sifting through the allegations of a complaint to evaluate its legal sufficiency. These tools should be exhausted before a plaintiff loses his day in court. *Id.* See *Dodd v. Spokane County*, 393 F2d 330, 334-35 (9th Cir. 1968) (ordering a hearing to determine whether the prosecutors' actions should be classified as quasi-judicial or investigative);

Dioguardi, supra at n. 15. The District Court's order of dismissal should be reversed.^{16/}

^{16/}

See also Quigley v. Hawthorn Lumber, 264 F.Supp. 214, 220 (1967), in which the Court refused to dismiss a complaint which alleged "the bald conclusory claim that the 'defendants' committed or caused the commission of the acts complained of," because the defendants had the right to ascertain the facts through pretrial discovery. Id. at 220. Also Hunt v. Mobil Oil Corp., 410 F.Supp. 10, 14 (S.D.N.Y. 1976); Tanxer v. Haynie, 405 F.Supp. 650, 653 (S.D.N.Y. 1976).

II. INVESTIGATORS ASSOCIATED WITH A PROSECUTION TEAM MAY NOT LAY CLAIM TO PROSECUTORIAL IMMUNITY UNDER IMBLER V. PACHTMAN: NOR HAVE THEY DEMONSTRATED THEIR GOOD FAITH AND REASONABLE GROUNDS FOR THEIR ACTIONS SUCH THAT THE COMPLAINT SHOULD BE DISMISSED AS AGAINST THEM.

The District Court, without so holding directly, states that "[a]s members of the Strike Force, Sontag and Killeen may also be able to avail themselves of the defense of absolute immunity" accorded to prosecutors in Imbler v. Pachtman, 424 U.S. 409 (1976). Counsel is not aware that any Court has ever so held. Killeen and Sontag are properly classified as law enforcement officers and, as such, they are entitled merely to a qualified good faith immunity. Pierson v. Ray, 386 U.S. 547 (1967).

And this qualified immunity defense is not one which a Court may award to a defendant in the manner in which the District Court has done so in this case. The good faith immunity defense must meet both a subjective and an objective standard. A defendant must, of course, himself believe that he was acting in good faith. Obviously, the defendant's own statements as to his state of mind in this regard are the only "direct" evidence on the issue; predictably, defendants -- as have Sontag and Killeen -- make boilerplate assertions that "All actions I took in this connection were done in good faith and in the reasonable belief that they were entirely lawful." (App. 319, 322) . But these statements, even when made under oath, are insufficient to finally establish the defense. The defendants' conduct must also meet an objective test. Thus, even if an investigator himself believed that he was acting

reasonably and in good faith, if his conduct was such that he acted with such disregard of the plaintiff's constitutional rights that his actions, under all of the circumstances, can not reasonably be characterized as being good faith, then the defendant will be liable. See e.g., Askew v. Bloomer, 548 F.2d 673, 679-80 (7th Cir. 1976).

The District Court's reliance upon Economou v. United States Department of Agriculture, 535 F.2d 688 (2d Cir. 1976), cert. granted sub nom, Butz v. Economou, 97 S.Ct. 1097 (1977) (No. 76-709) is misplaced. That ruling simply does not grant the District Courts plenary powers to decide contested issues of fact concerning a defendant's claim of a good faith defense. Economou brought suit against the Department of Agriculture and various individual members of the Department's staff, claiming that they had maliciously instituted proceedings against him with the goal of destroying his business. The case was dismissed against the Department for lack of jurisdiction. The individual defendants, as members of the executive branch, were held to be entitled to a qualified good faith immunity. The section of the opinion cited by the District Court below is this Court's statement concerning the proper procedures under the Federal Rules for making a determination of this issue in the context of a Rule 56 motion for summary judgment. This court's statement should not -- and cannot -- be read as the District Court has taken it as a grant of authority to the District Court to

make a determination on the merits of a disputed claim of good faith raised by way of a motion to dismiss. In Economou, the Court observed that

"If the plaintiff's claims are baseless, as defendants maintain, our holding does not necessarily require them to face an expensive or wasteful trial. Should the defendants by affidavit set forth undisputed facts demonstrating the reasonableness of their action, buttressed by affidavits of their good faith, and the plaintiff then fail to respond under oath with 'specific facts showing that there is a genuine issue for trial' regarding the defendants' good faith or the existence of reasonable grounds for their action, summary judgment dismissing the complaint might be appropriate. Rule 56(e), F.R.Civ.P."

In addition to the fact that Judge Ward was ruling upon a motion to dismiss and not one for summary judgment, it should be noted that the plaintiffs' sharply contest any claims that the defendants have made concerning their good faith either subjectively or objectively. The complaint is supported by affidavits from the plaintiff Louis C. Ostrer and three counsel for the plaintiffs; the allegations against the defendants are riddled with claims that the defendants have acted with complete bad faith, are guilty of unethical conduct, and have, in fact, embarked upon a course of conduct which violates the criminal laws of the State of New York. The defendants self-serving statements that they have acted in good faith hardly stand unopposed on the record of this case. The Court below, rather than making the determination that the Economou decision would permit in a summary judgment proceeding when the defend-

ants' affidavits are not met with counter-affidavits and, thus, could be accepted as true, decided that there is an issue of fact and that it should be resolved in favor of the defendants. This determination by the District Court of a factual issue in the case was wholly improper and unauthorized by any of the governing caselaw. See the cases collected in Shifrin v. Wilson, 412 F.Supp. 1282, 1295-97 (D.D.C. 1976). See also Savarin Corporation v. National Bank of Pakistan, 290 F.Supp. 285, 289 (S.D.N.Y.) affirmed, 447 F.2d 727 (2d Cir. 1968); Heyman v. Heyman, 356 F. Supp. 958, 970 (S.D.N.Y. 1973); Service Employees International Union v. County of Butler, 306 F.Supp. 1080 (W.D.Pa. 1969); Bodor v. East Coventry Township, 325 F.Supp. 1102, 1104 (E.D.Pa. 1971).^{17/}

This District Court's conclusion that Killeen and Sontag have established their immunity defense merely by claiming subjective good faith in their affidavits is error.

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Cf. Guitar v. Westinghouse Electric Co., 396 F.Supp. 1042, affirmed, 538 F.2d 309 (2d Cir. 1976). In that case, a libel action brought against a critic, the Court observed that whether proof of actual malice exists is a proper issue for the Court to determine on a motion for summary judgment. The Court did not rule that the critic had acted without malice, but rather that there was no proof that his acts were malicious. Judge Ward, in his decision below, however, has decided the Sontage and Killeen acted in good faith.

III. THE PROSECUTOR DEFENDANTS ARE NOT ABSOLUTELY IMMUNE FROM CLAIMS SUCH AS THOSE MADE BY THESE PLAINTIFFS.

The District Court ruled, in effect, that prosecutors are absolutely immune from suit, no matter what wrongs they are alleged to have committed and no matter what type of relief is sought by the plaintiffs. Imbler v. Patchman, 424 U.S. 409 (1976), does not establish such an all encompassing immunity.^{18/}

A. First, Imbler does not purport to immunize a prosecutor from actions he takes as an administrator or an investigative officer, rather than the Government's advocate in "initiating a prosecution and in presenting the [Government's] case." Imbler at 431. The Supreme Court specifically stated that immunity for the latter functions was the "only" issue decided in that case. The Court noted that each of the challenged activities by the Deputy District Attorney who prosecuted Imbler had been found by the Court of Appeals to be an "integral part of the judicial process"^{19/} 500 F.2d at 1302, and

^{18/}

It is assumed that the immunity principle in the context of a §1983 action would also apply in an action against a federal prosecutor.

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The absolute immunity of the prosecutor is generally viewed as a derivative of the absolute immunity granted to judges at common law. It is often referred to as a quasijudicial immunity and only extends to those functions in which the prosecutor participates in the judicial process. Shifrin v. Wilson, 412 F.Supp. 1282, 1303 (DDC 1976); Apton v. Wilson, 506 F.2d 83, 91 (D.C. Cir., 1974). The Court stated in Imbler that it is an overly simplistic approach to the question of prosecutorial immunity to characterize the prosecutor as a member of the executive branch and, thus, argue that he cannot claim the immunity reserved for the judiciary. The Court made an inquiry into the

"thus were functions to which the reasons for absolute immunity apply with full force." Imbler at 430. Imbler simply presented "no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrative or investigative officer rather than that of an advocate." Id.

Imbler itself does not create the broad immunity the defendant prosecutors claim. The Court's opinion refers to existing case law to the effect that "a prosecutor engaged in certain investigatory activities enjoys not the absolute immunity associated with the judicial process, but only a good faith defense comparable to the policeman's." 424 U.S. at 420. And, in a footnote, the Court stated:

"We recognize that the duties of the prosecutor in his role as advocate for the State involve actions apart from the courtroom. A prosecuting attorney is required, constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. They include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing and evaluating of evidence. At

19/ [continued from page -35-]

historical common-law prosecutorial immunity and the interest behind it and found that the common-law immunity was based upon the same considerations that underly the immunity of judges. Thus, they found that the quasi-judicial characterization of the prosecutor's immunity is not illogical even though he is a member of the executive branch. Imbler, supra at 990-91.

some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them."

424 U.S. at 431, n.33.

Several decisions by the lower courts since the Imbler decision support the view that prosecutors may not always cloak themselves with a full immunity. In Helstoski v. Goldstein, No. 76-1956 (March 28, 1977), the Court of Appeals for the Third Circuit dealt with a plaintiff's claims that the United States Attorney for the District of New Jersey was violating his rights through a variety of wrongful conduct including, inter alia, deliberately leaking false information concerning the plaintiff to the press with the intention of damaging the plaintiff's political reputation. The District Court granted the defendant's motion to dismiss the complaint on grounds of Imbler immunity. The Court of Appeals reversed, noting that:

Even if absolute prosecutorial immunity extends to the administrative and investigative functions of a United States Attorney, it is our opinion that certain paragraphs of Mr. Helstoski's complaint aver conduct which goes beyond the proper performance of these aspects of a prosecutor's job. We note, in particular, the several allegations of deliberate leaks by the prosecutor of false information concerning Mr. Helstoski in order to damage his political prospects. It would appear that such activity, if it occurred, would lie outside of the rationale for absolute immunity set forth in Imbler. At most, it would be subject to a qualified good-faith immunity.

In Shifrin v. Wilson, 412 F.Supp. 1282 (D.D.C. 1976), another case decided after Imbler, corporation counsel for the District of Columbia delayed issuing an opinion about the invalidity of a local ordinance until after the plaintiff had been arrested. The Court held that the defendant was not entitled to absolute prosecutorial immunity, but only to a good-faith immunity such as that of the police, because he was acting outside of his role and duties as an advocate. Id., at 1303. The Court cited Apton v. Wilson, 506 F.2d 83, 93-93 (1974), for the rationale for not extending absolute immunity to the acts of prosecutors committed beyond the scope of their duties in initiating and pursuing criminal prosecutions:

"...for the prosecutor's absolute protection ...is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse. Cases holding prosecutors absolutely immune have referred to them as 'quasi-judicial officers,' and the circumstances typically provide alternative instruments of the judicial branch to check misconduct -- the discretion of the grand jury, the procedures of a trial, and the potential sanction of discipline imposed by the court itself." 506 F.2d at 93-94.

Similarly, in Walker v. Cahalan, 542 F.2d 681 (6th Cir., 1976), also decided after Imbler, the plaintiff had been released from prison after 18 years because, on a motion for habeas corpus, it was found that his confession had been involuntary. A bill was pending before the state senate to give him \$25,000 for time lost in prison when the prosecutor sent a letter to the press saying that the plaintiff was obviously guilty and should not be given the money. The court held that sending a letter to the legislature and the press was within the prosecutor's general

powers but not his quasi-judicial functions and granted him only a qualified immunity. See also Austin v. Manlin, 433 F.Supp. 648 (E.D.Pa., 1977). (Assistant Prosecutor's actions in contacting warden at prison where plaintiff was incarcerated and arranging to have mail between plaintiff and his brother intercepted and copied were action of an "investigative" officer and Imbler immunity was unwarranted).

Finally -- and most dramatically in support of plaintiffs' claims that Louis C. Ostrer is being improperly pursued as a potential Government witness -- the Court in Tomko v. Lees, 416 F.Supp. 1137 (W.D.Pa. 1976) rejected two state prosecutors' motions to dismiss a complaint which charged them with "compelling plaintiff by means of a 'constant and relentless course' of threats and coercion to act on four occasions as a police agent and informant and to testify against persons...from whom he had allegedly purchased illegal drugs." Id. at 1138. The court observed that the plaintiff was challenging

alleged prosecutorial conduct that was neither judicial nor even quasi-judicial, but rather of a police/investigative nature. The immunity to which the defendant prosecutors claim entitlement does not extend to their conduct while engaged in such police activities as recruiting or cultivating of informants. See Hampton v. Chicago, 484 F.2d 602 (7th Cir., 1973) (Stevens, J.); Robichaus v. Ronan, 351 F.2d 533 (9th Cir., 1965); Ames v. Vavreck, 356 F.Supp. 931 (D.Minn., 1973). See also Imbler v. Pachtman, supra (specifically declining to consider such an extension of prosecutorial immunity).

B. Even if the Imbler immunity extends to the administration and investigative aspects of a prosecutor's actions, the defendants conduct in this case was so clearly beyond the proper exercise of their authority that it should not be cloaked with absolute immunity.

In Helstoski the Court stated that activities such as deliberate leaks of false information lie outside the proper performance of a prosecutor's job and would not be cloaked with absolute immunity even if Imbler were found to extend to all prosecutorial functions. Helstoski, supra at 4. "...[S]uch activity if it occurred, would lie outside of the rationale for absolute immunity set forth in Imbler." Id.

This principle has long been accepted. In Yaselli v. Goff, 12 F.2d 396 (2nd Cir., 1926), aff'd per curiam, 48 S.Ct. 155 (1927), the first statement on prosecutorial immunity in this Circuit, the Court stated that there was an absolute immunity when the prosecutor acts "in performance of the duties imposed upon him by law." Id. at 406. In Gregoire v. Biddle, 177 F.2d 579 (2nd Cir., 1949), an opinion written by Judge Hand, the court held that there was an absolute immunity which protected the prosecutor in that case. However, they stated that "[t]he decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers." Id. at 581.

More recently, in Scolnick v. Winston, 219 F.Supp. 836 (SDNY, 1963), the plaintiff alleged that Attorney General Lefkowitz and his assistant Siegel had conspired to incarcerate plaintiffs in a mental hospital in order to inhibit an investigation of an attorney's misconduct in connection with a large real estate deal. The defendants made a motion to dismiss alleging absolute immunity. The court held that, since it was not part of the official duties^{20/} of either of these defendants to arrange for the observation of persons in a hospital for the mentally ill, it is outside the scope of their authority and therefore immunity does not attach. Id. at 841. See also Martin v. Merola, 532 F.2d 191 (2d Cir., 1976); Sparkman v. McFarlin, 552 F.2d 172 (7th Cir., 1977).

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The official duties of the United States Attorney are outlined in 28 U.S.C. §547:

Except as otherwise provided by law, each United States attorney, within his district, shall -

- (1) prosecute for all offenses against the United States;
- (2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;
- (3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;
- (4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and
- (5) make such reports as the Attorney General may direct.

C. Finally, the Imbler immunity principle should not be extended beyond claims for money damages, and does not prohibit the granting of injunctive and/or declaratory relief. The rationale for the ruling in Imbler is that the threat of personal liability could well threaten the prosecutor's fearless performance of duty. This threat to the pocketbook is simply not a consideration when a plaintiff seeks equitable relief or a declaration of his rights, not dollars. Because the courts have consistently held that the doctrine of judicial immunity -- from which prosecutorial immunity is derived -- does not apply to civil rights actions for equitable relief, See e.g., Erdman v. Stevens, 458 F.2d 1205, 1208 (2nd Cir., 1972), cert. denied, 409 U.S. 889 (1972), it would be wholly inconsistent to accord a broader immunity to prosecutors. See Harris v. Harvey, 419 F.Supp. 30 (E.D.Wis., 1976). Cf. Browner v. Horowitz, 535 F.2d 830, 834 (3rd Cir., 1976).

IV. THIS ACTION IS NOT "PREMATURE" NOR DOES IT IMPINGE ON THE PROPER FUNCTIONING OF THE GRAND JURY, AND THE COURT'S SHOULD NOT DEFER DECISION OF THE CASE ON SUCH GROUNDS.

The District Court accepted the defendants' argument that the case should be dismissed because it was "premature," relying upon this Court's recent rulings in Martin v. Merola, 532 F.2d 191 (2d Cir. 1976) and Matter of Doe, 546 F.2d 498 (2d Cir. 1976).^{21/}

Martin concerned a complaint by indicted defendants that the New York state prosecutor had violated their right to a fair trial by publicly labeling them "vultures". This Court's decision was clearly guided by proper considerations of federal-state comity -- considerations which are absent in the case at bar in which the plaintiffs are claiming that officers of the federal court have embarked upon a considerably more vicious course of conduct than the one complained of in Martin. Further, the wrong complained of in Martin simply had not yet occurred --

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The Court below also relied upon Centracchio v. Garrity, 198 F.2d 383 (1st Cir. cert denied, 344 U.S. 866 (1952)). The plaintiff in that case sought an order suppressing certain evidence he had voluntarily surrendered to Internal Revenue agents and also an order enjoining the United States Attorney from presenting that evidence to a grand jury. The relief was refused, the Court emphasizing that the petitioner's evidence did not disclose that he had yet suffered any violation of his constitutional rights, under either the Fourth or Fifth Amendments: He had voluntarily turned over the papers. It was because the petitioner had not shown any violation that the Court stated that "judicial interference...with the action of a United States attorney in the administration of the criminal law, at a pre-indictment stage, must, we think be regarded as the exception rather than the rule" Id. at 387. Yet the Court contrasted this situation with one in which there had been a violation and there had been pre-indictment relief granted, citing In re Fried, 161 F.2d 453 (2d Cir. 1947). Relatedly, see Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977). Plaintiffs in this case have already suffered violation of their rights.

and, as this Court correctly reasoned, -- might never occur; the plaintiffs had not yet been tried, so it was impossible to adjudicate whether their right to a fair trial had been violated. The plaintiffs in this case, in contrast, are complaining of ongoing wrongs which are being perpetrated outside of any ongoing or contemplated grand jury proceeding^{22/} and/or prosecution. And Doe makes no ruling whatsoever on the merits of that case as it was presented to this Court, but rules solely on whether this Court even had jurisdiction to decide the appeal; this Court decided that appellate jurisdiction was lacking, and the appeal was dismissed.

Not only is the plaintiffs' action not premature, it is over-ripe for decision.^{23/} If the defendants tactics -- tactics

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The District Court mischaracterizes the plaintiff's complaint when it states that they seek to have the Court interfere with the grand jury proceedings. It is not the grand jury that the plaintiffs complain of (although they have sought relief from any wrongful action by that body), but rather the individual named defendants. In Matter of Doe, the Court aptly observed that a "grand jury is not a prosecutor's plaything and the awesome power of the Government should be used deliberately, not in haste, and without unwarranted or idle threats, direct or implied." This case concerns unwarranted direct threats by government prosecutors, not an attempt to evade the lawful investigative processes of a proper grand jury proceeding.

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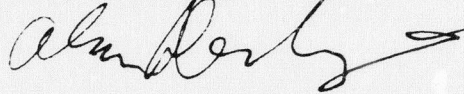
Plaintiffs seek a declaratory judgment in addition to other relief. Certainly their claims in Counts 3 and 4 meet the traditional requirements for the Court's exercise of jurisdiction under 28 U.S.C. §2201 that is, "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1970).

which the plaintiffs claim are wholly illegal and improper, and tactics which the defendants have not even denied! -- may be used to continue their campaign of harrassment in order to coerce the plaintiff Louis C. Ostrer into becoming a Government witness and into waiving his Fifth Amendment rights and if, as a culmination of that plan, the defendants may seek the indictment of three generations of the Ostrer family as an admitted method of obtaining Louis Ostrer's "cooperation," then the plaintiffs are entitled to know that such is the case.

The plaintiffs, particularly Louis Ostrer, should not have to make decisions in the dark about such important matters as whether it would be in their interests to "cooperate" if that decision would spare loved ones being indicted without cause, if such a procedure is a permissible bargaining technique for use by the Government. On the other hand, if the Government's methods are impermissible retaliatory tactics which violate plaintiff's Due Process rights, then the plaintiffs are similarly entitled to an adjudication of that issue without their having to wait for the irreparable injury of an indictment and testing the challenged tactics during the course of proceedings on a motion to dismiss.

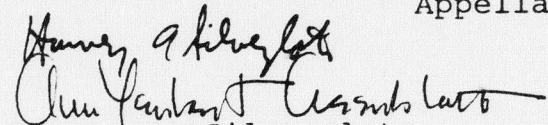
For all of the above reasons, the District Court' order that the plaintiffs' complaint be dismissed should be reversed by this Court.

Respectfully submitted,



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